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No. 10-273

Supreme Court, U.S.
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In The

Supreme Court of the United States

PATRICK YOUNGS,

Petitioner,

v.

INDUSTRIAL CLAIM APPEALS OFFICE,
WHITE MOVING & STORAGE, INC.
and PINNACOL ASSURANCE,

Respondents.

On Petition For A Writ Of Certiorari To The Colorado Court Of Appeals

BRIEF IN OPPOSITION OF RESPONDENTS WHITE MOVING & STORAGE, INC. AND PINNACOL ASSURANCE

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CORPORATE DISCLOSURE

Pinnacol Assurance is a political subdivision of the State of Colorado. There are no parent corporations or publicly held companies owning stock in Pinnacol Assurance.

White Moving & Storage, Inc., is a privately held Colorado corporation. There are no parent corporations or publicly held companies owning stock in White Moving & Storage, Inc.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	6
I. The Colorado Court of Appeals Did Not Misapply This Court's Decisions Regarding Separation of Powers	7
II. Petitioner's Right to Equal Protection Was Not Violated	15
III. The Colorado Court of Appeals Did Not Err in Denying Petitioner's Motion for Disqualification of Judges	18
CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASE LAW

Alaska Public Interest Research Group v. State, 167 P.3d 27 (Alaska 2007) 14

Bellendir v. Kezer, 648 P.2d 645 (Colo. 1982) 16

Christie v. Coors Transportation Co., 933 P.2d 1330 (Colo. 1997) 16

Commodity Futures Trading Comm'n v. Schor, 478 U.S. 822 (1986) 13

Crowell v. Benson, 285 U.S. 22 (1932) ..... *passim*

Culver v. Ace Electric, 971 P.2d 641 (Colo. 1999) 15

Dee Enterprises v. ICAO, 89 P.3d 430 (Colo. App. 2003) ..... *passim*

Dillard v. Industrial Claim Appeals Office, 134 P.3d 407 (Colo. 2006) 15

In re Marriage of Elmer, 936 P.2d 617 (Colo. App. 1997) 19

In re Marriage of Johnson, 40 Colo. App. 250, 576 P.2d 188 (1977) 19

Johnson v. District Court, 674 P.2d 952 (Colo. 1986) 19

Kentucky Commission on Human Rights v. Fraser, 625 S.W.2d 852 (Ky. 1981) 14

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911) 15

Liteky v. United States, 510 U.S. 540 (1994) 19

TABLE OF AUTHORITIES – Continued

Page

McKay v. New Hampshire Compensation Appeals Board, 732 A.2d 1025 (N.H. 1999).....11

MGM Supply Co. v. ICAO, 62 P.3d 1001 (Colo. App. 2002).....19

Mistretta v. United States, 488 U.S. 361 (1989).....14

Nevada Industrial Comm'n v. Reese, 560 P.2d 1352 (Nev. 1977).....14

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).....*passim*

Plasti-Line Inc. v. Tennessee Human Rights Commission, 746 S.W.2d 691 (Tenn. 1988).....14

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).....15

Schmit v. ITT Federal Electrical International, 986 F.2d 1103 (7th Cir. 1993).....14

Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985).....*passim*

Vanadium Corp. of America v. Sargent, 134 Colo. 555, 307 P.2d 454 (1957).....16

Wierman v. Tunnell, 120 P.2d 638 (Colo. 1942).....17

Williams v. White Mountain Constructions Co., Inc., 749 P.2d 423 (Colo. 1988).....15

STATUTES

Colo. Rev. Stat. § 8-40-101, *et seq.* (2010).....1

Colo. Rev. Stat. § 8-40-102 (2010).....14

TABLE OF AUTHORITIES – Continued

Page

Colo. Rev. Stat. § 8-40-102(1) (2010) 16

Colo. Rev. Stat. § 8-42-107(2) (2010) 2

Colo. Rev. Stat. § 8-42-107(8) (2010) 2

Colo. Rev. Stat. § 8-42-107(8)(c) (2010) 1

Colo. Rev. Stat. § 8-43-201 (2010) 6, 15, 18

Colo. Rev. Stat. § 8-43-207(1)(c) (2010) 17

Colo. Rev. Stat. § 8-43-209 (2010) 17

Colo. Rev. Stat. § 8-43-215 (2010) 17

Colo. Rev. Stat. § 8-43-301 (2010) 17

Colo. Rev. Stat. § 8-43-302 (2010) 17

Colo. Rev. Stat. § 8-43-308 (2010) 13

Colo. Rev. Stat. § 8-43-309 (2010) 17

Colo. Rev. Stat. § 8-43-313 (2010) 17

RULES

Sup. Ct. R. 10 6

Colo. R. Civ. P. 97 5

MISCELLANEOUS

Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915 (1988) 8, 10

STATEMENT OF THE CASE

This case involves a claim for benefits made by Petitioner pursuant to the Workers' Compensation Act of Colorado, Colo. Rev. Stat. § 8-40-101, *et seq.* (2010) (the Act). On March 29, 2005, Petitioner sustained a compensable injury when he tore his left bicep tendon. Petitioner underwent two surgeries; the second involved the use of a graft from Petitioner's left leg.

On May 4, 2006, Petitioner's authorized treating physician (ATP) determined Petitioner reached maximum medical improvement (MMI) from the effects of the injury. The ATP assessed an impairment rating of 5% to the left upper extremity and 5% to the left lower extremity. The ATP imposed work restrictions pursuant to a functional capacity evaluation (FCE) which found Petitioner could lift up to 30 pounds occasionally and 20 pounds frequently (floor to waist), as well as 40 pounds occasionally and 30 pounds frequently (waist to shoulder). The FCE also stated that Petitioner may push 67 pounds combined weight with both arms, and may pull 73 pounds combined weight with both arms.

On September 18, 2006, Petitioner underwent a Colorado Division of Workers' Compensation independent medical examination (DIME) pursuant to Colo. Rev. Stat. § 8-42-107(8)(c) (2010). The DIME was administered through Med Ops Management, Inc. (Med Ops), with which the DIME physician was affiliated. Med Ops scheduled independent medical

examination appointments and made other arrangements such as obtaining patients' medical records, collecting fees and providing a location for examinations. The DIME physician issued a report on September 27, 2006 in which she concurred with the May 4, 2006 date of MMI. She rated Petitioner's impairment at 8% of the left upper extremity and 3% of the left lower extremity.

The ATP was deposed on March 13, 2007. The ATP reviewed a list of jobs created by a vocational expert retained by Respondents. The ATP determined that Petitioner could perform ten of the jobs, and stated that Petitioner could perform work in a category that falls between sedentary and light.

Respondents' vocational expert relied on the restrictions provided by the ATP's deposition: lifting with both arms up to 30 pounds occasionally and 10-15 pounds frequently; no restrictions for the leg; occasional shoulder level or above reaching with left arm; and no driving duties while working. The vocational expert explained that Petitioner is able to perform light to sedentary, full or part time work.

On May 2, 2007, a hearing was held before an Administrative Law Judge (ALJ). The issues litigated included permanent total disability (PTD), whether Petitioner overcame the DIME physician's impairment rating thus affecting a permanent partial disability (PPD) award, and whether Petitioner's impairment is scheduled under Colo. Rev. Stat. § 8-42-107(2) (2010), or whole person under Colo. Rev. Stat. § 8-42-107(8)

(2010). The ALJ issued an order on July 11, 2007. The ALJ held that Petitioner is not permanently and totally disabled, Petitioner's impairment resides on the schedule, and Petitioner did not overcome the DIME physician's opinion regarding impairment rating.

On May 15, 2007, accusations were made through a local news channel that claimed the owner of Med Ops modified medical reports previously prepared by physicians and used the physician's electronic signature to "sign" the altered report. Another accusation claimed that the Med Ops owner asked physicians to change reports with the threat of withholding business if the physician would not comply. There is no evidence in the record substantiating these accusations.

Petitioner appealed the ALJ's July 11, 2007 order. Petitioner also filed a motion for new hearing and to strike the DIME. The ALJ issued a procedural order dated August 22, 2007 and directed that a hearing be convened regarding the motion. Petitioner was also permitted to take the deposition of the DIME physician, who testified she was 90% certain that nothing of substance was changed in the DIME report, and that she did not think that anything substantive was altered.

The hearing to consider the merits of Petitioner's motion for new hearing and to strike the DIME was held on October 24, 2007. On January 8, 2008, the ALJ issued an order denying Petitioner's motion. The

ALJ found that Petitioner introduced no persuasive evidence that Med Ops altered, or coerced the DIME physician in altering, the DIME report. The ALJ found that the DIME was not tainted despite the allegations against Med Ops because Petitioner failed to present persuasive evidence that the DIME report was altered.

Petitioner appealed the January 8, 2008 order. Petitioner's two appeals were combined. The ALJ issued a supplemental order on May 14, 2008. App. 44-63. Crediting Respondents' vocational expert's testimony, the ALJ held that Petitioner failed to establish that it is more likely than not that he is unable to earn any wages in the same or other employment. The ALJ also found that Petitioner failed to prove that the situs of his functional impairment is beyond the right upper extremity or left lower extremity. The ALJ determined that Petitioner proved he has impairment ratings of 8% of the left upper extremity and 5% of the left lower extremity. The ALJ noted that the DIME physician's opinion was not entitled to presumptive effect, and the ATP's opinion regarding the left lower extremity rating was more persuasive than that of the DIME physician. The ALJ ordered that Petitioner is not permanently and totally disabled, Petitioner's impairment resides on the schedule, and Petitioner is entitled to PPD benefits based on the scheduled ratings.

Petitioner appealed the ALJ's supplemental order. On October 3, 2008, the Industrial Claim

Appeals Office of the State of Colorado (ICAO) affirmed. App. 29-43.

Petitioner sought judicial review from the Colorado Court of Appeals. On March 13, 2009, Petitioner filed a motion for disqualification of judges pursuant to Colo. R. Civ. P. 97. App. 92-112. Petitioner requested that judges from the judicial branch recuse themselves from hearing his case on the alleged grounds of partiality, bias, and predisposition. Petitioner's motion was purportedly supported by an affidavit by Petitioner's attorney Chris Forsyth. App. 98-111. On April 8, 2009, the Colorado Court of Appeals denied Petitioner's motion. App. 64-65.

In an unpublished opinion announced on November 19, 2009, the Colorado Court of Appeals affirmed the decisions of the ALJ and ICAO. App. 1-28. Among other things, the Colorado Court of Appeals held that Petitioner failed to meet his burden of demonstrating beyond a reasonable doubt that the Act's provision for using ALJs to hear workers' compensation cases is unconstitutional. Petitioner filed a petition for rehearing. On February 18, 2010, the Colorado Court of Appeals modified its opinion and denied Petitioner's petition for rehearing. App. 66-67.

Petitioner filed a petition for writ of certiorari with the Colorado Supreme Court. The Colorado Supreme Court denied Petitioner's petition on May 24, 2010. App. 68.

REASONS FOR DENYING THE PETITION

Petitioner has not provided any compelling reason for this Court to grant his petition for a writ of certiorari. Sup. Ct. R. 10. Petitioner's primary argument appears to be that the Colorado Court of Appeals misapplied this Court's prior decisions in *Crowell v. Benson,* 285 U.S. 22, 51 (1932) and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50 (1982) in holding that giving ALJs in the executive department jurisdiction under Colo. Rev. Stat. § 8-43-201 (2010) to hear workers' compensation cases in Colorado does not violate the separation of powers provisions of either the Colorado or United States Constitutions. Petitioner's argument is without merit and fails to justify certiorari review.

Petitioner further argues that the Colorado Court of Appeals erred in concluding that § 8-43-201 does not violate constitutional equal protection requirements because there is sufficient rational basis for using ALJs to advance the legitimate governmental goals of quick and efficient resolution of workers' compensation claims. Whether there is a sufficient rational basis for using ALJs to hear claims under the Colorado Workers' Compensation Act is not an important federal question. Petitioner fails to cite any relevant decision of this Court or any other court with which the decision of the Colorado Court of Appeals is in conflict.

Finally, Petitioner maintains that his attorney's affidavit attached to his motion for disqualification of

judges establishes that the Colorado judicial branch is the equivalent to the membership of a "prison gang," and that based upon alleged statements by two members of the judiciary, the entire Colorado judicial branch is biased and thus Petitioner was denied a fair and impartial tribunal in his workers' compensation appeal. Petitioner's argument is based upon mere suspicion, surmise, speculation, rationalization, conjecture, or innuendo, and statements of mere conclusions which may not form the basis of a legally sufficient motion to disqualify. Petitioner has not established any reason for granting a writ of certiorari to review the denial of his motion for disqualification.

I. The Colorado Court of Appeals Did Not Misapply This Court's Decisions Regarding Separation of Powers

Petitioner contends that the separation of powers analysis of a panel of the Colorado Court of Appeals in *Dee Enterprises v. ICAO*, 89 P.3d 430 (Colo. App. 2003), which was followed by the panel of the Colorado Court of Appeals in the instant case, is flawed in determining that federal law allows for workers' compensation proceedings to be heard by an executive branch ALJ. Petitioner's argument is summarized as follows: (1) *Crowell v. Benson,* 285 U.S. 22, 51 (1932), determined that workers' compensation claims involved private rights; (2) *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50 (1982), held that suits that arose at common law regarding private rights must be heard by an Art. III judicial

branch judge; (3) Thus, the Colorado Court of Appeals violated the rulings of this Court by holding that the Colorado workers' compensation system involves rights that are purely statutory, did not exist at common law, and "has many characteristics of a public rights case." *Dee Enterprises,* 89 P.3d at 436-437. Contrary to Petitioner's contention, the holding of the Colorado Court of Appeals in *Dee Enterprises* is consistent with Art. III as well as the Court's opinions in *Crowell, Northern Pipeline*, and other precedents such as *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985).

In *Crowell, supra,* the Court upheld the constitutionality of agency adjudication of workers' compensation claims, notwithstanding its determination that workers' compensation involves private rights. 285 U.S. at 51. *Crowell* determined that an administrative tribunal may make findings of fact and render an initial decision of legal questions as long as there is adequate judicial review. *Id.* at 51-65. In order to ensure that the "essential attributes" of judicial power remained in Art. III courts, *Crowell* insisted upon de novo review of the agency's determinations of "jurisdictional fact" as well as legal determinations. *Id.* at 58-63. However, *Crowell* found Art. III would be satisfied by a review of the agency's other fact finding only upon the administrative record. *Id.* at 63-65; *see* Fallon, *Of Legislative Courts, Administrative Agencies, and Article III,* 101 Harv. L. Rev. 915, 924 (1988).

In *Northern Pipeline, supra,* the Court held unconstitutional the authority granted to non-Art. III

bankruptcy judges under the Bankruptcy Act of 1978 to adjudicate common law rights. *Northern Pipeline* stated that the Court's precedents establish that only controversies involving private rights may be removed from Art. III courts and delegated to administrative agencies for their determination. 458 U.S. at 70. Perhaps incongruously, *Northern Pipeline* reaffirmed *Crowell* and noted that therein the Court had approved the use of administrative agencies as adjuncts to Art. III courts. *Id.* at 77.

Northern Pipeline compared the unconstitutional Bankruptcy Act with the approved administrative workers' compensation scheme in *Crowell* and determined that the bankruptcy courts were exercising powers far greater than those lodged in the adjuncts approved in *Crowell*. *Id.* at 78-86. The Colorado Court of Appeals in *Dee Enterprises, supra,* 89 P.3d at 438, made the same comparison between Colorado workers' compensation provisions and the portion of the Bankruptcy Act found unconstitutional in *Northern Pipeline*. *Northern Pipeline* noted that in *Crowell*, the agency did not possess the power to enforce any of its compensation orders, and was appealable to a district court which had sole power to enforce it or set it aside depending upon whether the agency order was in accordance with the law and supported by evidence in the record. 458 U.S. at 78. *Northern Pipeline* also observed that *Crowell* involved the adjudication of congressionally created rights. *Id. Northern Pipeline* further noted the agency in *Crowell* "made only specialized, narrowly confined factual determinations

regarding a particularized area of the law" that were "statutorily channeled," that such agency "possessed only a limited power to issue compensation orders pursuant to specialized procedures, and its orders could be enforced only by order of the district court," and that such orders would be set aside if not supported by the evidence. *Id.* at 85.

The Court decided *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985) against a backdrop of criticism regarding the plurality opinion of *Northern Pipeline*. *See* Fallon, *supra*, 101 Harv. L. Rev. at 929. Recognizing that a strict construction of Art. III was not possible "in this area of 'frequently arcane distinctions and confusing precedents,'" the *Thomas* Court upheld as constitutional the power granted to non-Art. III arbitrators to make final decisions on compensation claims submitted to the Environmental Protection Agency, subject to review by an Art. III court only for "fraud, misrepresentation, or other misconduct." The Court stated that pursuant to its constitutional powers under Art. I, Congress "may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Art. III judiciary." *Thomas, supra,* 473 U.S. at 593-594.

The Court distinguished *Thomas* from *Northern Pipeline* on the basis that the right to compensation under the statutory scheme in *Thomas* did not replace a right to such compensation under traditional common law. *Id.* at 584. The Court was persuaded

that the statutory scheme did not violate separation of powers because, although the dispute involved two private parties, it had many of the characteristics of a public rights case. *Thomas* noted that the rights asserted were purely statutory and arose from a regulatory scheme designed to promote the public purpose of safeguarding the public health. *Id.* at 589.

The Colorado Court of Appeals in *Dee Enterprises v. ICAO*, 89 P.3d 430, 436 (Colo. App. 2003), determined that the workers' compensation scheme at issue is similar to the regulatory scheme in *Thomas* in that the rights provided by the Act are purely statutory and, contrary to the argument of Petitioner here, did not exist at common law. This also is consistent with other states' workers' compensation schemes. *See, e.g., McKay v. New Hampshire Compensation Appeals Board,* 732 A.2d 1025, 1029 (N.H. 1999). *Dee Enterprises* remarked that prior to the Act, employees injured in the course of employment were required to prove negligence on the part of their employer in order to recover for injuries. Since the Act was enacted, employees may recover compensation from their employers for job-related injuries regardless of fault. 89 P.3d at 436. The Act also defines both the terms of compensation to the injured employee and the procedures for arriving at the proper amount of compensation. *Id.* at 437. ALJs and the ICAO possess only such power as is conferred upon them by the Act, and they cannot exercise any jurisdiction, exert any powers, perform any duties, or

assume any authority unless the right so to do is given them by statute. *Id.*

Dee Enterprises determined that, as in *Thomas, supra,* "the Colorado workers' compensation scheme has many characteristics of a public rights case and serves the legitimate purpose of safeguarding the public health." *Id.* The Colorado Court of Appeals concluded that granting ALJs and ICAO the task of hearing and determining workers' compensation matters "does not diminish the likelihood of impartial decisonmaking [sic], nor does it threaten the role of the judiciary," and that "[t]o hold otherwise would 'defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task.'" *Id.* (citing *Thomas* and quoting *Crowell*).

Petitioner here points out that *Thomas* did not overturn *Crowell*'s holding that workers' compensation matters involved private rights. However, this is a distinction without a difference. Petitioner overlooks the fact that neither *Northern Pipeline* nor *Thomas* overturned the Court's analysis in *Crowell* approving administrative adjudication of workers' compensation claims, subject to judicial review, despite the existence of private rights.

Dee Enterprises further interpreted *Thomas* as not requiring de novo review of the agency findings,

and review by the Colorado Court of Appeals of ICAO's final orders for errors of law and abuse of discretion "is sufficient to protect the proper exercise of judicial function." *Id.*; *see* Colo. Rev. Stat. § 8-43-308 (2010) (listing grounds for setting aside agency orders). This interpretation is also consistent with the observation by the Court in *Northern Pipeline, supra,* that de novo judicial review of "jurisdictional" and "constitutional" facts has been undermined by later cases. *See* 458 U.S. at 82, n. 34. The *Dee Enterprises* court stated that this scheme "is consistent with the purpose of the Act, which is to avoid congestion of the courts with piecemeal litigation and to provide a method whereby claims arising out of work-related injuries can be resolved in a just and speedy manner." 89 P.3d at 437.

Dee Enterprises also rejected the argument that it is a violation of Art. III to deny parties to workers' compensation proceedings the option to consent to an adjudication by an ALJ. *Id.* at 437-438. Petitioner here does not cite any authority to establish that such an option is required to avoid an Art. III violation, but merely cites a case, *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 822 (1986), in which the regulatory scheme at issue did provide such an option. Moreover, *Dee Enterprises* pointed out that "the Colorado Act, like the agency model approved in *Crowell* and *Schor*, deals with only a particularized area of law, and the rights to be adjudicated in the employer-employee relationship are of great importance to the public health and welfare in that they

provide a method by which workers' compensation matters may be speedily and justly resolved" consistently with the purpose of the Act, which is to provide quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. 89 P.3d 438; *see* Colo. Rev. Stat. § 8-40-102 (2010) (stating the legislative intent of the Act).

Workers' compensation is an area of law that has been subject to administrative adjudication for a considerable period of time. *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 38 (Alaska 2007). In most jurisdictions in the United States, workers' compensation claims are processed through administrative agencies, and such systems are almost universally held constitutional even though they utilize administrative agencies, do not provide for trials by jury, and involve only private disputes. *See Plasti-Line Inc. v. Tennessee Human Rights Commission*, 746 S.W.2d 691, 693 (Tenn. 1988); *Kentucky Commission on Human Rights v. Fraser*, 625 S.W.2d 852, 854-855 (Ky. 1981); *Nevada Industrial Comm'n v. Reese*, 560 P.2d 1352, 1355, n. 6 (Nev. 1977). As demonstrated by *Thomas, supra*, and *Mistretta v. United States*, 488 U.S. 361, 381 (1989), the Court has more recently emphasized a "flexible understanding of separation of powers." *See also Schmit v. ITT Federal Electrical International*, 986 F.2d 1103, 1109-1110 (7th Cir. 1993) (following *Thomas* and other more recent decisions of the Court regarding Art. III).

Petitioner here wants a return to a rigid and unworkable system that is out of touch with the needs and practices of the modern administrative state for agencies to adjudicate private as well as public disputes. This request must be denied.

II. Petitioner's Right to Equal Protection Was Not Violated

Petitioner argues that § 8-43-201, which provides executive branch ALJs with jurisdiction to hear and decide workers' compensation matters, violates his right to equal protection. Generally, the provisions of the Act are presumed constitutional and the burden rests with the party challenging them to prove unconstitutionality beyond a reasonable doubt. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911); *Williams v. White Mountain Constructions Co., Inc.*, 749 P.2d 423, 430 (Colo. 1988). Petitioner has made no such showing here to justify certiorari review.

Petitioner's equal protection rights were not violated. The receipt of workers' compensation benefits is not a fundamental right. *Dillard v. Industrial Claim Appeals Office*, 134 P.3d 407, 413 (Colo. 2006). Petitioner has not shown he is a member of a suspect classification. Accordingly, a rational basis analysis must be applied. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40 (1973); *Culver v. Ace Electric*, 971 P.2d 641, 646 (Colo. 1999). The challenged provision will be allowed to stand if it bears a rational relationship to a legitimate governmental

objective and is not unreasonable, arbitrary or capricious. If any conceivable set of facts would lead to the conclusion that the challenged provision serves a legitimate purpose, the interpreting court must assume those facts exist. *Christie v. Coors Transportation Co.*, 933 P.2d 1330, 1333 (Colo. 1997).

The Colorado General Assembly intended the Act to "assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation." Colo. Rev. Stat. § 8-40-102(1) (2010). The purpose of the Act is to protect employees who sustain injuries arising from employment. *Vanadium Corp. of America v. Sargent*, 134 Colo. 555, 562, 307 P.2d 454, 459 (1957). This purpose is effectuated by providing a reliable source of income without the need of proving fault and providing a framework within which claims are speedily resolved. *Bellendir v. Kezer*, 648 P.2d 645, 647 (Colo. 1982). The administrative law structure allows for the speedy resolution of workers' compensation claims without the necessity of proving fault. Contrary to Petitioner's contention, the Act and its use of ALJs exist for many more reasons than merely "administrative convenience."

Petitioner questions the conclusion of the Colorado Court of Appeals below that using ALJs to hear workers' compensation claims advances the Act's goals of quick and efficient claims resolution. Petitioner asserts that because the Act includes in its appellate procedures the "extra step" of review by the ICAO, the Colorado workers' compensation scheme

"takes longer than other actions." Petitioner provides no evidentiary or legal support for this assertion. Petitioner also overlooks the expedient timelines and other streamlined processes that pervade the Act. *See, e.g.*, Colo. Rev. Stat. § 8-43-207(1)(e) (2010) (limiting discovery); Colo. Rev. Stat. § 8-43-209 (2010) (hearings shall commence within 100 days after the hearing is set, and only one extension of time of 60 days to commence the hearing is permitted); Colo. Rev. Stat. § 8-43-215 (2010) (ALJ has 15 working days after the conclusion of a hearing to issue a written order); Colo. Rev. Stat. § 8-43-301 (2010) (a petition to review must be filed within 20 days of the mailing of an order, briefs must be filed within 20 days, ALJ has 30 days after briefs to issue supplemental order, ICAO has 60 days after receipt of record to issue order); Colo. Rev. Stat. § 8-43-302 (2010) (ALJ has 30 days from entry of an order to issue a corrected order); Colo. Rev. Stat. § 8-43-309 (2010) (Colorado Court of Appeals directed to hear appeal within 30 days); Colo. Rev. Stat. § 8-43-313 (2010) (Colorado Supreme Court directed to advance workers' compensation cases on its calendar and render final decision within 60 days). Moreover, unlike Art. III judges, ALJs are presumed to possess special expertise and competence in dealing with the medical evidence that is a ubiquitous part of workers' compensation cases. *See Wierman v. Tunnell*, 120 P.2d 638, 640 (Colo. 1942).

Because Petitioner has not shown beyond a reasonable doubt that the current adjudicative provisions

of the Act fail to serve the legitimate purposes of the Act, his equal protection argument is without merit. Petitioner has advanced no legitimate argument to support the disturbance of the well-established law. He has not shown beyond a reasonable doubt that § 8-43-201, which provides ALJs exclusive jurisdiction to hear and decide entitlement to workers' compensation benefits, is unconstitutional. Petitioner has failed to demonstrate the existence of any important federal questions or meaningful conflict in appellate opinions. Thus, certiorari review is unwarranted.

III. The Colorado Court of Appeals Did Not Err in Denying Petitioner's Motion for Disqualification of Judges

Petitioner asserts that the Colorado Court of Appeals below has an "appearance of impropriety" and erred in rejecting the facts alleged by Petitioner's attorney's affidavit in support of the motion for disqualification of judges. Petitioner has attempted to relate purported "partiality, bias and predisposition" of the entire "judicial branch" specifically to Chief Justice Mullarkey of the Colorado Supreme Court and Chief Judge Davidson of the Colorado Court of Appeals. Contrary to Petitioner's motion, the affidavit of Chris Forsyth does not demonstrate that Chief Justice Mullarkey and Chief Judge Davidson "have acted with particular malice toward the issue of workers' compensation judges being in the judicial branch." Nothing in the affidavit of Chris Forsyth states facts, even if true, from which

it may reasonably be inferred that they have bias or prejudice that will prevent them from dealing fairly with Petitioner. The "facts" set forth in affidavit are legally insufficient because they are based on mere suspicion, surmise, speculation, rationalization, conjecture, or innuendo, and are statements of mere conclusions of the pleader which may not form the basis of a legally sufficient motion to disqualify. *See Johnson v. District Court*, 674 P.2d 952, 956 (Colo. 1986).

Regarding Chief Justice Mullarkey, Mr. Forsyth merely recites hearsay of purported statements she made and the fact that she participated in the denial of certiorari in *MGM Supply Co. v. ICAO*, 62 P.3d 1001 (Colo. App. 2002), in which Mr. Forsyth was an attorney for the unsuccessful petitioners. Regarding Chief Judge Davidson, Mr. Forsyth cites her opinion in *Dee Enterprises, supra*, in which Mr. Forsyth again was an attorney for the unsuccessful petitioners. Affidavits that contain only opinions and hearsay statements do not establish any bias or prejudice. *See In re Marriage of Elmer*, 936 P.2d 617, 619-620 (Colo. App. 1997). Adverse rulings alone do not constitute evidence of prejudice or bias warranting disqualification of a judge. *Liteky v. United States*, 510 U.S. 540, 555 (1994); *In re Marriage of Johnson*, 40 Colo. App. 250, 252, 576 P.2d 188, 190 (1977).

Petitioner failed to establish any basis for disqualification of judges, or any important question of federal law. Petitioner has not established any reason

to warrant certiorari review of the denial of his motion for disqualification.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that the Court deny the Petition.

Respectfully submitted,

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